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In the

Supreme Court of the United States

OCTOBER TERM, 1954

No. 34

UNITED STATES OF AMERICA,

Petitioner,

v.

THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY, LIMITED, and SUNNYLAND FURNITURE COMPANY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE SUNNYLAND WHOLESALE FURNITURE COMPANY

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ARGUMENT

I.

A garnishment lien being choate under state law is superior to a lien of the United States for unpaid taxes when the assessment list and the filing of the lien occurred subsequent to the establishment of the garnishment lien.

The garnishment and attachment statutes of Texas *(Vernon's Texas Civil Statutes 1925, Articles 300, 301, 4076, 4084)* have been uniformly construed as creating a lien upon personal property from the date of levy *Kanaman v. Hubbard, 22 S. W. 151, 110 Tex. 560; Focke v. Blum, 17 S. W. 770; United States v. Yates, 204 S. W. 2d 399, writ ref.* In the *Yates* case, the same arguments and Texas authorities advanced by the government in their brief (pp. 13, 14), filed herein were considered by the Texas court and it was found that these authorities dealt with the enforcement of a garnishment lien and not with its characteristics and nature. The Texas court concluded that, regardless of what might be the law in other states, an attachment lien was perfected, fixed, specific and choate from the incident of the levy of the writ. The Texas statutes create a lien by their very terms. Attachments may not be levied on claims that are merely contingent or potential, but the defendant's liability must be fixed and liquidated and must be established by affidavit under oath as to the justness and amount. See *5 Tex. Jr., p. 179, Sec. 15.* There are severe penalties for wrongful attachments and garnishments. This conclusion of the law of Texas has been upheld consistently and very recently in the case of *United States v. Standard Brass and Manufacturing Company, 266 S. W. 2d 407 (Civ. App.)* In a case involving the very same garnishment statutes as are involved in the instant case the Court held:

> "It is well settled in the jurisprudence of this state that a lien created by the levy of an attachment upon personal property creates a lien from the date of the

> levy and that the service of a writ of garnishment creates a lien on property subject to such writ of garnishment from the date of service of the writ. It has been so held in the face of contentions that such liens created by writs of attachment and writs of garnishment do not become fixed until the date of judgment which follows service of such writs."

The Court concluded in that case that the garnishment lien is superior to the tax lien of the United States unless the tax lien of the United States was fixed in point of time at an earlier date and does find that since the assessment list of the Commissioner of Internal Revenue preceded the garnishment lien, the government's lien was fixed in time and hence, first in right, but in the instant case, the facts show that the assessment list was signed by the Commissioner at a date later than the serving of the levy *(R. 13, 14)*.

The decision in the case of *United States v. Security Trust & Savings Bank, 340 U. S. 47* is not determinative of the questions involved in this case since under the California statute, the property of the defendant was attached merely *as security* for the satisfaction of a judgment and under the express decisions of the California Supreme Court, their garnishment lien had been found to be in choate. The opposite is true in Texas.

Granted that the characterization of a lien by the State as specific and perfected is not, of course, conclusive against the federal government, still it should be given great weight *United States v. Security Trust & Savings Bank*, supra. The liens created by *Sec. 3670* are general liens subject to the ordinary rules of priority, that first in time is first in

right and are not governed by the special priority rules benefiting the federal government as established in *Sec. 3466* for insolvent taxpayers, no insolvency having been alleged by the government. The general lien which the government claims, attaches to the tax debtor's property in the condition in which it exists at the date the lien arises and the government's rights can rise no higher than those of the taxpayers. *New York Casualty Co. v. Zwerner, 58 F. Supp. (D. C., Ill.)*. However, in construing the priority statute *Sec. 3466* the Court in *United States v. Waddill Co., 323 U. S. 351* stated:

> "This Court has in the past recognized that certain exceptions could be read into this statute. The question has not been expressly decided as to whether the priority of the United States might be defeated by a specific and perfected lien upon the property at the time of the insolvency or involuntary assignment."

Nor in cases not involving insolvency has the Court ever held that a specific and perfected lien is not an implied exemption from *Sec. 3670, 72. United States v. Gilbert Associates, 345 U. S. 361, 365; Illinois v. Campbell, 329 U. S. 362, 370.*

The instant case presents the problem to the Court squarely. We have a prior choate lien. This Court is called upon to determine whether such a lien is impliedly exempt from *Sec. 3670, 72.* This Court has shied away from specifically deciding whether the priority of the United States might be defeated by a specific and perfected lien upon the property, but has sidetracked the issue in many occasions

by finding that the lien under consideration was inchoate and reserving any decision as to an implied exception for a later determination. In this case the Court has the question squarely before it.

There is a long established rule of this Court that in determining whether a lien was specific and perfected there were three essential elements, to-wit: *the identity of the lienor, the amount of the lien and the property to which it attaches. Illinois v. Campbell*, supra. The present case comes within this established rule * * *. The tests are well met. Sunnyland Wholesale Furniture Company has more than a general power over unspecified property. It has an interest in a clearly divided portion of the assets based on a liquidated claim to the extent of a definitely ascertained sum of dollars and cents which had been severed from the assets of the tax debtor by a lien attaching at the time of the levy of the writ. At that moment, the identity of the lienor, the amount of the lien and the property to which it attached were absolutely known. There was more than a "*caviat of a more perfect lien to come*," since there was an actual seizure and separation of the assets. The respondent contends that this garnishment lien, choate from its inception, possessed "the characteristics of a specific perfected lien which alone bars the priority of the United States." See *United States v. Knott, 298 U. S. 544; United States v. Albert Holman Lumber Co., 206 F. 2d 685 (C. A., 5), rehearing den., 208 F. 2d 113 (C. A., 5).*

If the lien under the Texas law is choate, the universal principal of law that the first in time is first in right ought

to apply. This has long been the decision of this Court. See *Rankin v. Scott, 12 Wheat at p. 179, 66 L. Ed. 592; United States v. City of Greenville, 118 F. 2d 963 (4 C. A.)* and particularly see the recent decision of the Court *United States v. City of New Britain, Conn., et al., 347 U. S. 81* in which the Court stated:

> "Federal statutes do not attempt to give priority in all cases to liens created under the paramount authority of the United States * * *."

Thus priority of each statutory lien contested here must depend upon the time it attached to the property in question and became choate. If the lien became choate at the date of the levy of the writ, then it is prior in time and prior in right to the government tax lien and it ought to be granted its rightful priority. This does not require any reliance upon a doctrine of relation back as the lien exists from the date of the levy. *United States v. Standard Brass & Manufacturing Company*, supra.

Certain it is that many a specific and choate lien may later be set aside by subsequent events. This is true in the case of a judgment lien which may at a later date be vacated by reversal by a higher Court or in the case of a mortgage securing a note which may require the filing of a lawsuit and the obtaining of a judgment foreclosing said mortgage, in which case, it may be found that the mortgage and note may be subject to a number of defenses, thus eventually vacating the lien and the same may be true of the tax lien of the United States as it may later be determined that the assessment was in error or the amount claimed ex-

cessive. From a practical standpoint is the tax lien then any more fixed or specific or choate than the garnishment lien under consideration? We think not.

CONCLUSION

Appellee would show that this case was fully considered in the Court below and all the authorities were brought to the attention of the Court and that the case was fully argued there. We submit that the majority opinion of the Court below is correct. The judgment of the United States Court of Appeals for the Fifth Circuit should be sustained.

Respectfully submitted,

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I hereby certify that copies of this brief have been served upon the Honorable Simon E. Sobeloff, Solicitor General, United States Department of Justice, Washington 25, D. C., Counsel for Petitioner and also upon Mr. Searcy L. Johnson, Mercantile Bank Building, Dallas, Texas, and R. B. Cousins, III, 1011 Mercantile Securities Bldg., Dallas, Texas, Counsel for Respondents, Liverpool & London & Globe Insurance Company, Ltd.